No. 06-1467

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 6, 2007

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Are the procedural due process and preemption issues raised by Willis barred by the doctrines of res judicata and collateral estoppel?

2. Is there a procedural due process right to a predeprivation hearing in a state eminent domain case where the applicable state statute affords two opportunities for judicial review: the filing of exceptions or objections to the report of court-appointed commissioners; and the filing of a separate action for injunctive relief?

3. Does the federal preemption set forth in 49 U.S.C. § 10501(b) apply to the construction of private rail track over which the United States Surface Transportation Board has no jurisdiction under 49 U.S.C. § 10501(a)?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings in this case or in the Supreme Court of Oklahoma other than those listed in the caption.

CORPORATE DISCLOSURE AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, Public Service Company of Oklahoma ("PSO"), states that it is a wholly-owned subsidiary of AEP Utilities, Inc., which is a wholly-owned subsidiary of American Electric Power Company, Inc., formerly known as American Gas and Electric Company, and that there are no other publicly held corporations that own ten percent (10%) or more of the stock of either PSO or AEP Utilities, Inc.

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JURISDICTION

This is an appeal of a decision of the Court of Civil Appeals of Oklahoma dated September 19, 2006 which became a decision of the highest court in Oklahoma when the Supreme Court of Oklahoma denied certiorari on February 5, 2007. The Petition for Writ of Certiorari was placed on the docket in this Court on May 7, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.[1]

STATEMENT OF THE CASE

A. Introduction

This case began as a routine condemnation action between an electric utility and a landowner in the state district court in Rogers County, Oklahoma in October 1992. The Respondent, Public Service Company of Oklahoma ("PSO"), sought to obtain an easement from the landowner, Petitioner B. Willis, C.P.A., Inc. ("Willis"), for a private track to facilitate deliveries of coal to its electricity generating station. When negotiations with Willis failed, PSO sought to exercise eminent domain power conferred by Oklahoma law to obtain the easement across Willis' property.

Now, more than fourteen years later, this case is before this Court for the fourth time;[2] this time seeking review of a

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[1] Willis' reference to 28 U.S.C. § 2106 (Pet., at 1) is misplaced as that section provides only appellate remedies and not an independent basis for jurisdiction.

[2] The previous appeals are: *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.*, 528 U.S. 1003 (1999) (writ of certiorari denied); *B. Willis, C.P.A., Inc. v. Goodpaster*, 528 U.S. 1046 (1999) (writ of certiorari denied); and *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 540 U.S. 811 (2003) (writ of certiorari

decision of the Court of Civil Appeals of Oklahoma in an interlocutory appeal affirming PSO's right to condemn. Importantly, when the state trial court held the hearing Willis claims to have been denied, Willis offered no witnesses nor evidence of any kind to show that PSO did not have the right to condemn. Instead, Willis argued only that the court's decision was incorrect and the hearing was too late.[3]

The issue of just compensation is now before the state trial court and a jury trial is currently scheduled for January 2008.

The first issue raised by Willis in this case challenges the constitutionality of Oklahoma's statutory eminent domain procedure; however, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), in a related case involving these same parties and this same occurrence, has already determined that the Oklahoma procedure is constitutional. This Court later denied certiorari. Consequently, Willis is precluded from again litigating that issue. Even if Willis is not so precluded, the Constitution is satisfied by the payment of just compensation and a post-deprivation proceeding. In addition, if a pre-deprivation hearing were desired, Willis could have sought a stay, supercedeas, injunction, or other order to prevent PSO's acquisition of the easement, but did not. Willis did,

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denied).

[3] Willis again impugns the integrity of the state trial judge, who is one of the most respected members of the trial bench in Oklahoma, with the spurious allegation that *ex parte* communications were conducted concerning the merits of the case. Willis failed in efforts to remove the state trial judge and no court, state or federal, has ever found a basis for these claims. In reality, the *ex parte* conversation of which Willis complains occurred in 1994 and involved only scheduling and administrative matters which are expressly authorized in the Oklahoma Code of Judicial Conduct, Canon 3(B)(6)(a) (5 Okla.Stat., Ch. 1, App. 4).

however, file numerous state and federal court cases seeking various forms of relief, but none were successful.

The second issue raised by Willis is its assertion that the federal preemption provisions of 49 U.S.C. § 10501 preempt Oklahoma's eminent domain statutes; however, the United States Surface Transportation Board ("STB" or "Board") and the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), in a related case involving these same parties and this same occurrence, have each determined that there is no preemption applicable to this occurrence. This Court later denied certiorari. Consequently, Willis is precluded from relitigating that issue. Even if Willis were not so precluded, there is no applicable preemption.

This case presents none of the reasons justifying review usually required by this Court. *See* Sup. Ct. R. 10. It does not seek to resolve a conflict between circuits, between the highest courts of two or more states, or between the state and federal courts. The federal issues it presents have been decided by this Court and Willis has presented no compelling reason for reversal.

B. Background

The Oklahoma Constitution and statutes authorize the taking of private property for public purposes by electric utilities like PSO through the exercise of eminent domain subject to various requirements, including payment of just compensation. Okla.Const., Art. 2 § 24; 27 Okla.Stat. §7. Condemnation procedures are the same as for railroad companies. *Id.*; 66 Okla.Stat. §§ 51 - 57.

Oklahoma's condemnation procedures are well described by the Tenth Circuit in the related case of *B. Willis, C.P.A., Inc.*

v. Pub. Serv. Co. of Okla., 182 F.3d 931, 1999 WL 335207 (10th Cir.), *cert. denied* 528 U.S. 1003 (Unpublished) (Pet. App. C at 19a), as follows:

> The procedure may be outlined in pertinent part by the following steps: (1) the condemnor corporation applies to the district judge, with notice to the landowner, for selection of a three-person commission; (2) the commissioners inspect the property, assess just compensation for the injury involved, and file a report with the clerk of the court, which is promptly forwarded to interested parties; (3) if the condemnor pays the assessed sum, it may take immediate possession consistent with its proposed use, though all parties retain the right to challenge the commission's report; (4) review may be sought in the district court by filing written exceptions to the report or a demand for jury trial; (5) the district court's final judgment (approving compensation or denying condemnation) is subject to appeal, but such review shall not delay the condemnor's use of the property, if approved, so long as the assessed compensation has been paid.

Id. at *1.

Both the Oklahoma Constitution, Art. 2 § 24, and Oklahoma statutes, specifically 66 Okla.Stat. § 53(C), authorize condemnors to take possession of property without the consent of the landowner upon payment of the amount of just compensation assessed by court-appointed commissioners.

At the inception of this case, PSO followed the statutory procedures, paid the amount of the commissioners' award into court, and only then took possession of the easement and constructed its private track. During this time, Willis

threatened to interfere with construction and was enjoined by the state trial court. At no time prior to construction did Willis seek a stay, injunction, supercedeas, or other order in the state trial court to prevent possession or construction during the pendency of the appeal. Willis did, however, initiate two (2) appeals and eight (8) original actions in the appellate courts of Oklahoma as well as four (4) cases in the United States District Court for the Northern District of Oklahoma and one administrative proceeding before the STB.

In February 2001, nearly six years after PSO had completed its track across Willis' land, Willis commenced an action at the STB seeking a declaration that the construction and operation of the track was unlawful because it had not first been approved by the STB under 49 U.S.C. § 10901. That section requires rail common carriers to obtain STB authorization before constructing or operating new or extended railroad lines. The STB denied Willis' petition in a decision served October 3, 2001, concluding that its jurisdiction extends only to track used for "common carrier service," that the track over Willis' land constitutes "private track," and that:

> if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires . . . Board authorization or approval.

B. Willis, C.P.A., Inc. Petition for Declaratory Order, Finance Docket No. 34013, 2001 WL 1168090 (STB served Oct. 3, 2001) ("*STB Declaratory Order I*"). Willis' petition for reopening and reconsideration of that ruling was denied by the STB in a further decision served July 26, 2002. *Id. on petition*

for reopening, 2002 WL 1730018 (STB served July 23, 2002) ("*STB Declaratory Order II*").

The D.C. Circuit upheld the STB's determination that PSO's track is a private track and as such is not subject to federal jurisdiction under 49 U.S.C. § 10501. *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 2002 WL 31684796 (No. 01-1441, DC Cir. Nov. 26, 2002). That court specifically noted and rejected Willis' contention that 49 U.S.C. § 10501(b)(2) created exclusive federal jurisdiction over *all* track, including track used for private rather than common carriage, stating that "[t]his interpretation is implausible on its face." *Id.* at *1. Willis' petitions for rehearing or rehearing *en banc* were denied in two *per curiam* orders. No. 01-1441, *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 2002 WL 31684796 (DC Cir. Nov. 26, 2002), *reh. denied* Jan. 10, 2003. Willis then petitioned this Court for a Writ of Certiorari, which was denied on October 6, 2003 (No. 02-1498, 540 U.S. 811 (2003)).

Willis is precluded by its prior litigation from re-trying the issues it raises here. Alternatively, all of the issues Willis now seeks to raise were correctly decided in favor of PSO and should be affirmed. Certiorari should be denied.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. Willis is precluded by a prior decision of the United States Court of Appeals from relitigating the alleged denial of due process.

Willis has had all of the process which is its due, it simply does not like the results. Willis now asserts that it was denied due process of law because PSO did not obtain a final,

unappealable judgment confirming its right to take Willis' property by condemnation. As will be discussed below, this Court has never held that such a judgment is a prerequisite for condemnation, but this Court need not reach that issue because Willis has already litigated the federal constitutional issue in a case involving the same parties and the same occurrence and lost. Willis is now precluded from relitigating those issues.

The state trial court initially found that PSO had the right to exercise eminent domain power and condemn an easement across Willis' property in March 1994. Willis appealed that decision on other grounds without seeking a stay, posting supercedeas, or obtaining an injunction, and, in June 1997, after PSO had built its private track, the Supreme Court of Oklahoma reversed the trial court and remanded the case for further proceedings consistent with its opinion. *See Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997).

After that case was remanded, but before any further decision was reached on either PSO's right to take or Willis' right to just compensation, Willis filed two separate suits in the United States District Court for the Northern District of Oklahoma ("Northern District") alleging, *inter alia*, deprivation of its civil rights under 42 U.S.C. § 1983. Willis claimed that it was denied due process because there had been no final, unappealable decision on PSO's right to condemn prior to PSO's possession of the property. The Northern District consolidated the cases and granted summary judgment to PSO and Willis appealed.

In *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.*, 182 F.3d 931, 1999 WL 335207 (10th Cir. 1999), *cert. denied* 528 U.S. 1003 (unpublished) (Pet. App. C at 19a), the Tenth Circuit found as follows:

> Virtually all of [Willis'] complaints derive in one way or another, from the eminent domain proceeding prosecuted by PSO. As outlined above, that proceeding affords [Willis] the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation. *See generally* Okla.Stat.Ann. tit 66, §§ 51-57. Thus, until that proceeding is concluded, any objections he may have cognizable under the most directly pertinent provision of the federal Constitution – the Just Compensation Clause (JCC) – are not ripe for adjudication under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-96 (1985).

Id. at *2 (Pet., Appendix C at 23a).

The Tenth Circuit found that Willis' due process claim was ripe, that the Oklahoma condemnation statutes are constitutional, and that Willis had received all that the Constitution requires. As the Court explained:

> [O]ne condemnation-related claim here clearly falls outside the *Williamson* bar. In addition to objections to his own proceeding, [Willis] appears to raise a generalized facial challenge to the state eminent domain scheme itself, for permitting any condemnor to take immediate possession upon payment of an administratively-determined compensation before final judicial resolution of the landowner's objections, *see* Okla.Stat.Ann. tit 66, §53(C). While an objection to the taking "as applied to [Willis'] property would be unripe [under Williamson]," such a "facial challenge to the [statutory scheme]" is immediately adjudicable. *See Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

Id. (Pet. App. C at 23a-24a).

Willis now seeks to relitigate the constitutionality of the Oklahoma statutory condemnation scheme in this case; however, Willis is barred by the doctrine of issue preclusion. *See generally Arizona v. California*, 530 U.S. 392, 414 (2000), quoting Restatement (Second) of Judgments § 27 (1982), p. 250 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

Applying the doctrine as it relates to this case and the prior Tenth Circuit case, the issue is one of law involving the right to a predeprivation hearing in the eminent domain context in both cases, the parties are identical in both cases, and the occurrence is the same in both cases. The Tenth Circuit case was a valid and final judgment which included a determination of the constitutionality of the Oklahoma eminent domain procedure, which Willis again seeks to invalidate in this case.

The only difference between the two cases is that the Tenth Circuit case involved a civil rights claim based on the "Taking" and "Just Compensation" Clauses, and this case involves the exercise of eminent domain in keeping with the "Taking" and "Just Compensation" Clauses. As the Restatement explains, the issue is nevertheless precluded "whether on the same or a different claim." *Id.*; *see also Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998) ("We see no reason why the preclusive effects of an adjudication on parties and those 'in privity' with them, . . . , should differ depending solely upon the type of relief sought in a civil action."); and *United States v. Mendoza*, 464 U.S. 154, 158 (1984), citing *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under the judicially developed doctrine

of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.").

"As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. at 153-54); *see also United States v. Mendoza*, 464 U.S. at 158. These doctrines "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. at 95-96 (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)).

In the present case, Willis has already had its day in court on the issues of a supposed right to a predeprivation hearing and the constitutionality of the Oklahoma statutory condemnation procedure. Willis' Argument 1 is precluded.

II. Willis has received due process through the availability of predeprivation compensation and injunctive relief and post-deprivation hearing and appeal.

This issue was decided by this Court in affirming the federal district court, without opinion, in *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D.Tex. 1974), *aff'd* 419 U.S. 1042, *reh. denied* 419 U.S. 1132 (1975). In *Joiner*, a three-judge panel extensively reviewed the Texas condemnation procedure, which is similar in most respects to the Oklahoma procedure, and found it constitutional. Willis does not discuss *Joiner* nor cases which have followed it, and offers no reason for

overruling it.

The landowners in *Joiner*, like Willis (Pet. at 14-19), argued that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a predeprivation hearing on the right to condemn. *Id.* at 771-74. The court said:

> The gravamen of their complaint on this point is that potential condemnors may acquire the right to possession . . . prior to an adjudication of the right of condemnation, the necessity for condemnation, or the amount of compensation to be paid. We are unable to find a constitutional defect in this portion of the eminent domain framework.

Id., at 771.

The *Joiner* court, in specifically addressing the landowners' right to contest the public use and necessity for condemnation, found that the landowners' rights are adequately protected by the available procedures for excepting to the report of the court appointed commissioners and by the availability of injunctive relief. Because of its cogency, the District Court's opinion is quoted here at length as follows:

> Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in Condemnation, the property owner may litigate these matters in the County Court at Law with the right of appellate review of any final judgment. Pursuit of this avenue of review

> does pose the risk that the condemnor will gain the right of possession through [the statute].
>
> As an alternative, however, property owners may commence a simultaneous collateral injunctive action in district court. If the proposed appropriation is not for a public purpose or the condemnor does not have the power to condemn property, the condemnation proceedings are void, the County Court at Law is without jurisdiction, and the district court will enjoin the condemnation proceedings. *** We believe that the ability of the property owners to receive a judicial adjudication of the right to condemn private property through a collateral proceeding sufficiently protects their interest in the property sought to be condemned.

Id. at 772.

Like the applicable Texas statute in *Joiner*,[4] the Oklahoma statute at issue, 66 Okla.Stat. § 53(C),[5] together with the

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[4] Vernon's Texas Code Ann., Article 3268, repealed, *now see* Tex. Property Code, Sections 21.021, 21.044, 21.062, and 21.063. This Court's decision in *Joiner, supra*, has been applied to these new statutes as well. *See, e.g., Hope v. United States*, 23 Cl.Ct. 776, 783 (1991).

[5] In pertinent part:

> And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

Oklahoma Constitution, Art. 2, § 24,[6] authorize the condemnor (PSO) to take possession of the easement upon payment of the value of the property taken either to the landowner or to the court for the landowner.[7]

Under both the Texas scheme at issue in *Joiner* and under the Oklahoma statutory and constitutional authorities, due process is satisfied because the landowner (Willis) has two avenues for judicial review: First, by filing exceptions or objections to the report of the court appointed commissioners; and Second, by filing a separate action for injunctive relief.

The present case is the culmination of Willis' attempts to utilize the first option to defeat PSO's condemnation. Willis

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[6] In pertinent part:

> Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation.

[7] "One practical effect of this procedure is to require the land owner to initiate any hearing on the validity of the taking, but this aspect of the Texas eminent domain laws has been held to be compatible with due process." *Smart v. Tex. Power and Light Co.*, 525 F.2d 1209, 1211 (5th Cir. 1976), citing *Joiner, supra*; *see also Washington Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1320 (4th Cir. 1983) (following *Joiner, supra*). Procedural due process is satisfied if the landowner is afforded an opportunity to challenge the public use aspect of the taking. *See Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 101-02 (R.I. 2006).

filed exceptions to the report of the commissioners in 1993, which were overruled in 1994. Willis then filed an interlocutory appeal of that order, but did not seek or obtain a stay, supercedeas, or other order to prevent PSO from entering on the property and constructing its private track. *See, B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997). Even though the Supreme Court of Oklahoma reversed the trial court's decision on the exceptions, neither that court nor the trial court found it necessary to order PSO to vacate the easement. Willis had the opportunity, throughout the state condemnation proceedings, to ask for an injunction – which would have provided the pre-deprivation hearing Willis claims was denied, but Willis chose not to do so.

PSO, on the other hand, sought and obtained an injunction to prevent Willis from interfering with PSO's rightful possession of the easement. Willis appealed that order as well. In an unpublished decision, the Court of Civil Appeals of Oklahoma found that the trial court acted properly in issuing the injunction and that, even though the trial court had been reversed, the trial court "was not required to undo all that had transpired before then." *Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, Okla.Sup.Ct. Case No. 90,569, *cert. denied* (Resp. App. A, p. 1a ¶13). That decision was not appealed to this Court and is now the settled law of the case.

Willis could also have sought injunctive relief in a separate proceeding, but did not do so. *See Town of Ames v. Wybrant*, 220 P.2d 693, 696 (Okla. 1950) ("[W]e deem it well to say that the District Court after objection to the Commissioners' report . . . could make an order temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn." Citation omitted); *Delfeld v. City of Tulsa*, 131 P.2d 754, 761 (Okla. 1942) (finding no prejudice in placing the burden on the landowner to seek injunctive relief

"when the sole issue was whether the use to which this land was to be put was a public use"); and *cf., Delhi Gas Pipeline Corp. v. Swanson*, 520 P.2d 670, 671-72 (Okla. 1974) (landowner filed separate action for trespass and injunction, but waived objections to the right to condemn by not raising or preserving them for appeal in the condemnation case); *Graham v. City of Tulsa*, 261 P.2d 893 (Okla. 1953), *reh. denied* (trial court's refusal to enjoin condemnor's possession of the landowner's property pending the appeal was not error); and *Wrightsman v. Sw. Natural Gas Co.*, 46 P.2d 925, 933 (Okla. 1935) (in *dicta*, the court found that a trial court could "make an order temporarily restraining a condemnor from taking possession of the land pending final determination of the right to condemn").

Willis did, however, seek extraordinary relief from the Supreme Court of Oklahoma in eight (8) separate original actions (generally seeking writs of mandamus and/or prohibition) and was unsuccessful in each.

Rather than confront the foregoing authorities, Willis argues that it has "a procedural due process right to a predeprivation hearing whenever the state deprives a citizen of property." Pet. at 15. The cases on which Willis relies do not involve eminent domain, and do not support this statement.

For example, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court found that the defendant in a replevin case is entitled to a predeprivation hearing. Courts have since refused to extend that decision to the eminent domain context. *See, e.g., Vazza v. Campbell,* 520 F.2d 848, 850 (1st Cir. 1975) ("Until the Supreme Court directs otherwise, we still continue to measure eminent domain proceedings against this standard [in *Joiner, supra*] rather than against the procedural requirements of such cases as Fuentes v. Shevin, . . . , which deal with fundamentally

different issues."); and *Gov't of Virgin Islands v. 19.623 Acres of Land*, 536 F.2d 566, 570 (3rd Cir. 1976) (circuit court reversed district court's reliance on Fuentes because it was bound by this Court's affirmance in *Joiner, supra*).

Under the jurisprudence of this Court, Willis received the process which is due in the state condemnation case and failed to avail itself of alternative procedures for injunctive relief.

III. The court below correctly rejected Petitioner's argument that 49 U.S.C. § 10501(b) preempted PSO's use of state eminent domain law to build its private track as an impermissible collateral attack on prior agency and federal court rulings.

In its Argument 2, Willis once again asserts that PSO's private track, which was built and is maintained by PSO, and over which PSO's own coal traffic has been transported, is subject to exclusive federal jurisdiction under 49 U.S.C. § 10501(b). Willis further argues that said exclusive jurisdiction "precludes condemnation under state eminent domain law." Pet. at 19.

Willis' jurisdictional/preemption argument is utterly without merit. As the state court below noted, the federal agency with jurisdiction over railroads – the STB – has already twice considered Willis' § 10501 argument, and twice ruled unequivocally that PSO's track is wholly outside the scope of § 10501 because it is a private track rather than a common carrier line. *STB Declaratory Order I*; *STB Declaratory Order II*. Moreover, the D. C. Circuit upheld the STB's ruling in an

unpublished *per curiam* decision,[8] and this Court denied certiorari (540 U.S. 811 (2003)). By now asking the state courts in Oklahoma to rule that their jurisdiction over PSO's 1992 eminent domain action was preempted by exclusive federal jurisdiction under § 10501, Willis is plainly engaging in an impermissible collateral attack on those rulings in order to relitigate issues already finally and competently adjudicated.[9] As the court below succinctly put it,

> Willis has had his day in court on this issue. He may not be satisfied with the result, but he is, nonetheless, bound thereby and may not relitigate the findings of the STB in the courts of Oklahoma.

Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc., 155 P.3d at 851, Pet. App. B at 15a.

Seeking to avoid the *res judicata* effect of the prior STB and federal court rulings, Willis now argues that the STB simply found that it lacked jurisdiction over *PSO*, and not that

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[8] No. 01-1441, *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 2002 WL 31684796 (DC Cir. Nov. 26, 2002), *reh. denied* Jan. 10, 2003.

[9] Even if Willis were free to relitigate the non-jurisdictional status of PSO's track under § 10501, and even if it were somehow able to obtain a ruling that PSO's track was subject to federal jurisdiction thereunder, *the eminent domain jurisdiction of state courts would still not be preempted.* To the contrary, because federal railroad laws do not include a grant of eminent domain authority for common carrier railroads, railroads must proceed under state eminent domain laws when needed for construction of their jurisdictional rail lines. *See, e.g., Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F.Supp.2d 989, 1012 (D.S.D. 2002), *aff'd in pertinent part* 362 F.3d 512 (8th Cir. 2004). In short, Willis' jurisdictional argument is not only barred by *res judicata*, and wrong on the merits as discussed in the text, it is an argument that leads nowhere.

it lacked jurisdiction over PSO's private track (a palpably false characterization of the STB's rulings as even a casual reading of them will confirm), and that in any event the preemptive reach of § 10501(b) is broader than STB jurisdiction. In fact, however, subsection (a) of § 10501 grants the STB plenary "jurisdiction over transportation by rail carrier," and subsection (b) simply complements subsection (a) by confirming that

> The *jurisdiction of the Board [STB]* over–
>
> > **(1)** *transportation by rail carriers*, and the remedies provided in this part with respect to rates, ..., routes, services, and facilities of such carriers; and
> >
> > **(2)** *the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks*, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> *is exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(Emphasis added). In other words, the preemptive effect of subsection 10501(b) is confined to and limited by the STB jurisdiction it protects.[10] Accordingly, the STB's final

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[10] *See also Florida E. Coast Ry. Co. v. West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001):

> The ICCTA pre-emption provision does not preclude the application of 'all other law.' .... Rather, express pre-emption

determination that PSO's track is a private track, and that as such it is not subject to the agency's jurisdiction at all, necessarily means that § 10501(b)'s preclusive effect does not attach, either.[11]

Even if Willis were entitled to relitigate the jurisdictional status of PSO's private track – and as explained above, it is not – this argument is fundamentally flawed and would necessarily have to be rejected once again.

A. The STB does not have jurisdiction over private track.

As noted above, the Board's general grant of jurisdiction is found at 49 U.S.C. § 10501(a)(1), which states that the STB has

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> applies only to state laws 'with respect to regulation of rail transportation.' 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws 'with respect to rail transportation.' See Bennett v. Spear, 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) .... In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, Black's Law Dictionary 1286 (6th ed. 1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

[11] As the STB noted in its second decision in the Willis case, common carrier "spur, industrial, team, switching, or side tracks" are subject to STB *jurisdiction* under § 10501(a) (and hence immune from state regulation under § 10501(b)), even though the STB is precluded from regulating them under 49 U.S.C. § 10906. The STB contrasted such common carrier tracks from purely *private* tracks (like that at issue here) which are not subject to STB jurisdiction under § 10501(a) at all – and hence are likewise outside the preemptive scope of § 10501(b). *STB Declaratory Order II*, 2002 WL 1730018, at *1.

"jurisdiction over transportation by rail carrier." "Rail carrier" is in turn defined at 49 U.S.C. § 10102(5) as "a person providing common carrier railroad transportation for compensation." The phrase "common carrier" is not defined in the statute, but it has long been established that a critical determinant of whether an entity provides common carrier services is whether it holds itself out to provide service to the general public. *See, e.g., Status of Bush Universal, Inc.*, 342 I.C.C. 550, 564 (1973); *State of Vermont & Vt. Ry., Acquisition and Operation in Vt.*, 320 I.C.C. 609, 611-12 (1964); *Atchison, Topeka & Santa Fe Ry. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915); *Tap Line Case*, 23 I.C.C. 277, 292 (1912); and *Black's Law Dictionary* 205 (7th ed. 1999).

This "holding out" element is, therefore, a fundamental test for whether rail trackage constitutes a common carrier facility subject to the Board's jurisdiction. *See New York Cent. R.R. v. S. Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964) *aff'd*, 338 F.2d 667 (7th Cir. 1964) ("*New York Central*") and *Hanson Natural Res. Co. – Non-Common Carrier Status – Petition for a Declaratory Order*, ICC Finance Docket No. 32248 (ICC Served Dec. 5, 1994) ("*Hanson*").

In *New York Central*, the plaintiff sought to enjoin the defendant railroad from operating over private mine trackage, owned by Peabody Coal Company, which connected Peabody's mine to defendant's common carrier line, without first obtaining authorization from the ICC. Plaintiff relied on *Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266 (1926) to support its position that defendant's operation over the track to the mine was an extension of defendant's line that required Commission authorization. The defendant railroad argued that "it operates on the Peabody track to serve only the Peabody mine, that it has no right to serve anyone else, and that it does not hold itself out by tariff or otherwise to serve the general

public over this track." *New York Central*, 266 F. Supp. at 466. The court concluded that authorization from the ICC was not needed to operate over the private track to serve the track owner:

> [A] carrier need not apply for Commission certification ... for operating over private track to serve the track owner, where the carrier does not engage in common carrier service over the track and where the carrier does not use it[s] funds to maintain the track ***
> Unless the carrier operating over private track to serve the track owner serves the public over the track or makes some investment of its resources in the track, it is difficult to understand how the carrier could, thereby, 'undertake the extension of its line of railroad, or acquire or operate any line of railroad, or extension thereof, or engage in transportation under this chapter over or by means of such additional or extended line of railroad.'

New York Central, 226 F. Supp. at 473.

Almost thirty years later, the Board relied on *New York Central* when it decided *Hanson*.[12] In *Hanson*, the ICC discussed in detail the subject of private rail track versus common carrier railroad lines, and found, in circumstances quite similar to those here (40 miles of private track over which the owner's coal was moved by a common carrier railroad from the owner's mine to a point of connection with the common carrier railroad's lines), that the involved track was private

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[12] The Board noted that "[f]ew cases have involved a private line..." and that "[t]he best case that we have found that turns upon, and explains, operations by a common carrier railroad over a "private" line is [*New York Central*]." *Hanson* at 23.

track not subject to the agency's jurisdiction.[13] In so holding, the Board stated,

> A railroad is a common carrier if it purports to hold itself out as a common carrier for hire and if there is an ostensible and actual movement of traffic for the public for hire. The principal test is whether there is a bona fide holding out with the ability to carry for hire.

Hanson at 14. *See also Northern Plains R.R. Co. – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT*, ICC Finance Docket No. 32077 (ICC served Dec. 28, 1992) (private railroad would not become a common carrier subject to the ICC's jurisdiction as long as it, or a third party under contract to it, carries only its corporate affiliate's property over its track between a coal mine and a connection with a common carrier); *Boeing Co. – Acquisition and Operation Exemption – Chehalis W. Ry. Co.*, ICC Finance Docket No. 31916 (ICC served Oct. 24, 1991) (shipper would not become a common carrier by railroad if it carried only its own property by rail between its plant and the point of connection with a common carrier's mainline).

Thus, the first step in determining whether the STB has jurisdiction over a particular line of track is to determine whether the track is held out for service as a common carrier facility. As discussed earlier, the Board has no jurisdiction over activities or operations by parties that do not hold

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[13] The Board distinguished private lines which are not subject to § 10901(a) and § 10903(a) in the first instance, from an exempt spur under § 10907(b)(1) [now § 10906]. "[I]t should be noted ... that a private line, although it may be called a spur is not a section 10907(b)(1) [now § 10906] spur, because it is not, in the first place, a section 10901(a) railroad line." *Hanson* at 21 n.12.

themselves out to provide transportation service to the public. Neither the general licensing provision of 49 U.S.C. § 10901 (for the construction and operation of rail lines) nor the exception to that licensing requirement contained in 49 U.S.C. § 10906 (for auxiliary track) can have any application to tracks and operations that do not involve common carriage.

The facts in this case are clear and were recited by the STB in its October 3, 2001 served decision in this matter:

> PSO submitted a verified statement stating that it had paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the *New York Central* analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper able to receive shipments on the line.

STB Declaratory Order I, 2001 WL 1168090, at *2. Based on these facts, the STB was correct in concluding that neither the construction of this private trackage, nor BNSF Railway Company's ("BNSF") operation over the private trackage to serve PSO's electric generating station, was subject to the Board's jurisdiction.

Willis simply ignores the above "holding out" element which is a fundamental test for whether rail trackage constitutes a common carrier facility subject to the Board's jurisdiction. Willis also takes out of context and misrepresents the prior STB decision by quoting only a portion of the STB's decision of October 3, 2001 to the effect that "private tracks constitute

a narrow limited category of *rail operations*." Pet. at 20. The STB's actual decision clarified that such private tracks represent "a category of rail operations that *falls outside the Board's statutory jurisdiction*" and that "as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status *not subject to the Board's jurisdiction.*" *STB Declaratory Order I*, 2001 WL 1168090, at *2 (emphasis added).

Additionally, Willis grossly misstates the facts when it asserts without any support that the track at issue is "controlled" by BNSF (Pet. at 21) and that "possession and control of the track in question was turned over to BNSF in March of 1995" (*id.* at 24). Here, PSO chose to build and maintain a private track, at its own expense, to serve only its own traffic. PSO has never offered to make service available over the track to any other shipper. BNSF has no ownership interest in the line. It does not pay to operate over the line. It does not pay to maintain the line. BNSF does not control the line. The operations that BNSF conducts over the track are solely on PSO's behalf, and, in fact, BNSF has no right to offer to provide service to any other shipper. *See STB Declaratory Order II,* 2002 WL 1730018, at *1.

B. The preemption provision of ICCTA did not extend the STB's jurisdiction to private lines.

Willis relies upon 49 U.S.C. § 10501(b), and cases interpreting and applying it, to argue that the STB has had exclusive jurisdiction over construction and operation of all rail trackage, including private track, since enactment of the ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803) ("ICCTA"). Pet. at 19-25. Willis fails to reconcile, however, the preemptive effect of 49 U.S.C. § 10501(b) with the general

grant of jurisdiction contained in § 10501(a). Preemption only comes into play when some area of federal law expressly or implicitly regulates the field. Willis's reliance on preemption cases is thus misplaced. The question at hand is whether the STB has jurisdiction over private track, not whether federal law preempts state law. The STB's jurisdiction is set forth in 49 U.S.C. § 10501(a), not § 10501(b).

Willis completely ignores legislative history in relying upon the ICCTA in support of its claims that the Board has jurisdiction over the construction of rail trackage such as PSO's. The accompanying Report of the Committee of Conference on the ICCTA confirms that while residual State regulatory authority was being eliminated, it was only that which previously had co-existed with (and was subject to) the ICC's power:

> Also integrated into the statement of general jurisdiction is the delineation of the exclusivity of Federal remedies *with respect to the regulation of rail transportation.* Former section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980, former section 10501(d) and 11501(d), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act. *The Conference provision retains this general rule, while clarifying that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally.* For example, criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, *because they*

> *do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.*

H.R. Rep. No. 104-422, 104th Cong. 1st Sess. at 167 (1995) (emphasis supplied). The same rationale applies equally to non-criminal statutes and regulations that "do not generally collide" with the STB's economic regulatory authority.

Willis cites *CSX Transp., Inc., v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996), for its sweeping preemption assertions; however, in that case, plaintiff CSX Transportation was indisputably a common carrier and thus subject to the jurisdiction of the STB under 49 U.S.C. § 10501(a). The question for the court was whether state regulation of a particular area of CSX's activities, such as a customer service center, was allowed or whether § 10501(b) preempted state regulation. The situation is very different here. PSO is not a rail carrier under § 10501(a), and more importantly *the track at issue is not a common carrier facility*, and thus the jurisdiction of the Board does not attach. Without jurisdiction in the first instance, the analysis should never reach subsection (b) preemption issues.

Willis also cites four STB and federal district court decisions for the proposition that "states are . . . precluded from exercising jurisdiction in the face of federal preemption." Pet. at 21-22. These cases are inapposite. One of these cited cases involved state/local control over common carrier railroad operations through local permitting requirements that could be used to deny a common carrier railroad the ability to conduct some part of its common carrier transportation operations, or to proceed with activities that already have been authorized by the STB. *See Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington N. R.R. Co. – Stampede Pass*

Line, 2 S.T.B. 330 (1997) ("*Stampede Pass Line*").[14] The other three cases cited by Willis, *Fletcher Granite Co., LLC – Petition for Declaratory Order*, STB Finance Docket No. 34020 (STB served June 29, 2001), *Flynn v. Burlington N. Santa Fe Corp.*, 98 F.Supp.2d 1186 (E.D. Wash. 2000), and *Wis. Cent. Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1013 (W.D. Wis. 2000) ("*Marshfield*"),[15] all involved State or local actions that purported to control matters similarly regulated by the STB or that might interfere with a carrier's interstate rail operations or otherwise involved activities that were integrally related to the railroad's ability to provide interstate common carrier rail service.

These decisions merely stand for the proposition that where a State or local regulation purports to impose a separate approval or "pre-clearance" condition on a railroad activity specifically subject to approval by the STB under Title 49, or attempts to regulate or unreasonably interfere with common carrier railroad service deemed by statute to be within the STB's exclusive regulatory jurisdiction, the conflict will be

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[14] This decision is consistent with the decisions of the STB and the courts that 49 U.S.C. § 10501(b) preempts State and local efforts to thwart STB-approved construction and operation of common carrier rail lines, based on local environmental and safety concerns. *See, e.g., Dakota, Minn. and E. R.R. Corp. v. South Dakota*, 236 F.Supp.2d at 1006 (holding that a South Dakota eminent domain statute imposing new requirements that a railroad must meet before it may exercise eminent domain power was pre-empted as "pos[ing] an insurmountable barrier" to the STB-approved rail construction project in question).

[15] Willis argues that since Marshfield was not a common carrier, but federal preemption was found to apply, it supports application of preemption in this matter even though PSO is not a common carrier. Pet. at 24. The critical distinction, of course, is that the track in *Marshfield* was a common carrier rail line (owned by the Wisconsin Central), while here, the track is private line (owned by PSO).

resolved by preemption of the State or local action. As explained in these decisions, the preemptive effect of the ICCTA is circumstance-specific, not transcendent as contended by Willis, and a traditional fact-specific preemption balancing test will need to be performed in many cases. *See, e.g., Stampede Pass Line*, 2 S.T.B. at 338. Additionally, Willis completely fails to show how the PSO condemnation action, which was undertaken as a means of obtaining direct service from BNSF as a competitive alternative, would in any way regulate or unreasonably interfere with interstate transportation. Of course, the PSO state court condemnation action did not involve any attempt to require "pre-clearance" of railroad activities subject to the STB's exclusive jurisdiction or otherwise regulate or unreasonably impede or interfere with common carrier operations subject to the jurisdiction of the STB.

Willis further references ICC case authority to the effect that prior regulatory approval must be obtained under 49 U.S.C. § 10901 for condemnation of a common carrier "railroad line." Pet. at 23-24. Again, Willis misses the boat with this line of argument. As the foregoing discussion makes clear, and as the STB and D.C. Circuit held, PSO's private track is not a "railroad line" subject to STB jurisdiction and therefore its condemnation did not require prior STB approval.

While the ICCTA updated the language of 49 U.S.C. § 10901(a) in several respects, it did not alter its pre-existing limitation to the construction, acquisition, or operation of a common carrier "railroad line." Moreover, the legislative history of the ICCTA in the Conference Report explicitly confirms that Congress intended § 10901 to remain inapplicable to construction of tracks by non-railroads to serve their own facilities:

> [T]he Conference intends no change in existing law with respect to the coverage of regulatory authority over construction of rail lines. Specifically, non-railroad companies who construct rail lines to serve their own facilities, whether or not such lines would be classified as a spur or other auxiliary track exempt from agency jurisdiction, are not required to obtain agency approval to engage in such construction.

H.R. Rep. No. 104-422, 104th Cong. 1st Sess. at 179 (1995). Congress has made clear that, in relation to rail transportation, jurisdiction is vested in the STB only when a common carrier is involved (49 U.S.C. § 10501(a)). A common carrier must obtain a license to construct new track (49 U.S.C. § 10901) unless that track falls under an exception (49 U.S.C. § 10906) in which case, as noted earlier, the Board has jurisdiction, but no license is required. In these situations the Board's jurisdiction is complete and preempts state regulation. When the owner of the track is not a common carrier but instead a non-railroad, and where the track is not to be held out for use in providing common carrier service to the public, the Board does not have jurisdiction and therefore no license is required. PSO falls into this latter category and, therefore, was not required to obtain a license from the Board.[16]

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[16] For the reasons explained above in this Section III, the STB does not have jurisdiction over private tracks, the ICCTA did not extend the STB's jurisdiction to private tracks, and Willis is bound by the earlier STB and court decisions on these issues. Although it is thus unnecessary to consider the point, even if the ICCTA had extended the STB's jurisdiction to private track, the ICCTA was enacted after PSO obtained possession and commenced construction and it would not be appropriate to apply it retroactively.

CONCLUSION

The Petitioner, B. Willis, C.P.A., Inc., has had its day in Court on PSO's right to exercise eminent domain power and on the issue of federal preemption. A jury trial is now scheduled on just compensation issues in January 2008.

Meanwhile, Willis has filed eight (8) original actions and two (2) appeals in the appellate courts of Oklahoma and four (4) cases in federal court. Willis has also raised the issue of federal preemption before the STB, has appealed those rulings, and has lost each time.

All of these rulings are now final and should not be reopened in this case. It is time for this vexatious and wasteful litigation to end. The Petition for Certiorari should be denied.

Respectfully submitted,

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June 6, 2007

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